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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH T. WOLPERT, III AND KATHLEEN M. WOLPERT, INDIVIDUALLY AND AS GUARDIANS OF JOSEPH T. WOLPERT, IV, COURTNEY L. WOLPERT, SHAWNA L. WOLPERT, ERIN M. WOLPERT, AND ASHLEY K. WOLPERT, PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

I. Whether the doctrine of *Feres v. United States*, 340 U.S. 135 (1950), should be overruled.

II. Whether the doctrine of *Feres v. United States*, 340 U.S. 135 (1950), should be held inapplicable where the negligent act was not an order by a soldier superior in rank to the injured soldier.

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v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Counsel for the petitioners request a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The orders of the court of appeals (App., *infra,* 1a) and the district court (App., *infra,* 2a) are unreported. Neither court wrote an opinion in this case, so for factual background the complaint filed in this action (App., *infra.,* 3a) is included herein.

JURISDICTION

The judgment of the court of appeals (App. *infra,* 1a) was entered on December 9, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

28 U.S.C. §1346(b) provides in part:

> Subject to the provisions of [28 U.S.C. §§2671-80], the district court * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

STATEMENT

Joseph T. Wolpert, III was a member of the Delaware Army National Guard with a rank of Specialist 4. On August 17, 1986, Mr. Wolpert and other members of the Delaware Army National Guard, including Private First Class Richard Marchese, were in the course of their annual two-week federal service under 32 U.S.C. §502 at Fort A. P. Hill, Virginia. App., *infra*, 3a. Private First Class is a lower rank than Specialist 4.

About 2:00 P.M. on August 17, 1986, Private Marchese was in the cargo section of an Army truck unloading supplies, and Mr. Wolpert was standing behind the truck distributing the supplies. Private Marchese negligently threw or slid a section of tent beam toward Mr. Wolpert. The beam landed on Mr. Wolpert's right foot, causing crush injuries and a disabling condition known as reflex sympathetic dystrophy, originally involving the right leg and now his left leg as well. App., *infra*, 3a, 4a.

Due to the disabling nature of his injuries, Mr. Wolpert lost his civilian job paying about $1,000 per month and has been discharged from the Army and the National Guard, losing about $150 per month in National Guard pay. He now receives a total of less than $500 per month in Army and Veterans Administration benefits for himself and the other petitioners, his wife and five children.

The petitioners filed this action in the United States District Court for the Eastern District of Pennsylvania under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§1346(b), 2671-80, seeking damages from the United States for Private Marchese's negligence. The district court granted the United States' motion to dismiss the complaint, App., *infra*, 2a, on the basis of *Feres v. United States*, 340 U.S. 135 (1950), and its progeny. The court of appeals dismissed the petitioners' appeal on the same basis. App., *infra*, 1a.

REASONS FOR GRANTING THE PETITION

Feres v. United States, 340 U.S. 135 (1950), was wrongly decided. It has denied a proper remedy to thousands of members of our armed services who have been injured or killed in their military service, and has relegated them and their families to inadequate veterans' benefits. If it is not overruled, it will condemn thousands more to the same fate.

The petitioners' FTCA claims are not barred by the express language of any of the exemptions in 28 U.S.C. §2680, but rather by the "incident to service" exemption engrafted upon that section by this Court in *Feres*. In fact, §2680(j) bars FTCA claims "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." Thus, "Congress specifically considered, and provided what it thought needful for, the special requirements of the military. There was no proper basis [for this Court in *Feres*] to supplement — i.e., revise — that congressional disposition." *United States v. Johnson*, 481 U.S. ____, ____, 107 S. Ct. 2063, 2070 (1987) (Scalia, J., dissenting).

The Court gave three reasons in *Feres* for its holding: the lack of parallel private liability, the "distinctively federal" relationship between the Government and military personnel, and the availability of veterans' benefits. 340 U.S. at 141-45. The Court added a fourth rationale several years later: that suits for service-connected injuries would interfere with military discipline. *United States v. Brown*, 348 U.S. 110, 112 (1954).

However, those reasons do not justify the *Feres* doctrine. *United States v. Johnson,* 481 U.S. at ____, 107 S. Ct. at 2071 (Scalia, J., dissenting). This Court has itself rejected the "parallel private liability" rationale. *Id. (citing Rayonier, Inc. v. United States,* 352 U.S. 315, 319 (1957) and *Indian Towing Co. v. United States,* 350 U.S. 61, 66-69 (1955)). The "distinctively federal relationship" rationale, if it ever made sense, is "no longer controlling." *United States v. Shearer,* 473 U.S. 52, 58 n.4 (1985). Furthermore, it "is not even a good excuse in policy, much less in principle, for ignoring the plain terms of the FTCA." *United States v. Johnson,* 481 U.S. at ____, 107 S. Ct. at 2071 (Scalia, J., dissenting).

This court has also acknowledged that the third rationale, the availability of veterans' benefits, is "no longer controlling." *United States v. Shearer,* 473 U.S. at 58, n.4. Nothing in the FTCA or the Veterans' Benefits Act, 38 U.S.C. §301 *et seq.,* provides for exclusivity of remedy. *United States v. Johnson,* 481 U.S. at ____, 107 S. Ct. at 2072 (Scalia, J., dissenting) *(quoting from Brooks v. United States,* 337 U.S. 49, 53 (1949)). Thus, both before and after *Feres,* this Court has allowed injured servicemen to bring FTCA suits even though they had received veterans' benefits. *United States v. Johnson,* 481 U.S. at ____, 107 S. Ct. at 2072 (Scalia, J., dissenting) *(citing United States v. Brown,* 348 U.S. 110 (1954) and *Brooks v. United States,* 337 U.S. 49 (1949)). Also, Congress could not have believed that veterans' benefits constitute a fair and adequate remedy. The benefits that the petitioners now receive do not amount to *half* of Mr. Wolpert's former earnings, much less compensate him for the loss of use of his legs, his pain and suffering, and his wife's and children's loss of consortium.

The fourth and final rationale, regarding the effect of suits on military discipline, is a curious afterthought. If Congress had perceived a significant likelihood of interference with military discipline in service-connected claims generally, it would not have limited the exemption in 28 U.S.C. §2680(j) to claims arising out of "combatant activities * * * during time of war." *United States v. Johnson*, 481 U.S. at ____, 107 S. Ct. at 2073 (Scalia, J., dissenting). *Feres* bars all service-related claims because of the possibility of interference with military discipline in some, despite Congress' obvious lack of concern with that possibility. That is tragic overkill, and judicial legislation at its worst.

If the aim of the *Feres* doctrine is to preserve military discipline and protect military decisionmaking, the doctrine does a poor job of it. Even under *Feres*, civilian courts frequently "examine military decisionmaking and thus influence military discipline." *Id.* at ____, 107 S. Ct. at 2074. Civilians' suits for military negligence, soldiers' suits for injuries not "incident to service," and service-connected claims involving civilian negligence may invade "the sanctity of military decisionmaking" no less than suits barred by *Feres*. *Id.*

Even if Congress had intended to bar service-connected suits because of the "military discipline" rationale, and even if the *Feres* doctrine accomplished that purpose, *Feres* should not apply to suits such as this, in which the negligent act is not an order of a superior officer. Private Marchese was *inferior* in rank to Mr. Wolpert, and was negligent in the very ordinary task of unloading a truck. If this suit is allowed to proceed there will *not* be judicial scrutiny of high-level decisions or judgments, "obedience to orders," or the "duty and loyalty to one's service and to one's country." *United States v. Johnson*, 481 U.S. at ____, 107 S. Ct. at 2069. Very simply, the liability issue in this case is whether Private Marchese should have done what any reasonable person would have done: unloaded the truck carefully and warned Mr. Wolpert before sliding or throwing a heavy piece of tent beam toward him.

In sum, "*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received." *United States v. Johnson*, 481 U.S. at _____, 107 S. Ct. at 2074 (Scalia, J., dissenting) *(quoting from In Re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 1242, 1246 (E.D.N.Y.), *appeal dism'd*, 745 F.2d 161 (2nd Cir. 1984)). If Mr. Wolpert had been a civilian when he was injured, he and his family could sue the Government under the FTCA and recover for their loss. But because he served his country through the National Guard, the *Feres* doctrine as it presently stands limits him and his family "to a fraction of the recovery they might otherwise have received. If [this Court's] imposition of that sacrifice bore the legitimacy of having been prescribed by the people's elected representatives, it would (insofar as [the Court is] permitted to inquire into such things) be just. But it has not been, and it is not." *United States v. Johnson*, 481 U.S. at _____, 107 S. Ct. at 2076 (Scalia, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DOCKET NO. 88-1712

JOSEPH T. WOLPERT, III AND KATHLEEN M. WOLPERT, INDIVIDUALLY AND AS GUARDIANS OF JOSEPH T. WOLPERT, IV, COURTNEY L. WOLPERT, SHAWNA L. WOLPERT, ERIN M. WOLPERT, AND ASHLEY K. WOLPERT, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE.

Present: BECKER, HUTCHINSON AND COWEN, *Circuit Judges.*

ORDER

On July 21, 1988, the United States District Court for the Eastern District of Pennsylvania dismissed the appellants' Complaint, which asserted claims under the Federal Tort Claims Act. The bases for the District Court's dismissal were *Feres v United States*, 340 U.S. 135 (1950), and its progeny.

The appellants appealed to this Court on September 15, 1988. The basis for the appeal is the appellants' assertion that *Feres* should be overruled or modified. As they concede, however, this Court does not have the authority to overrule or modify decisions of the United States Supreme Court, such as *Feres.*

Therefore, on this 9th day of December, 1988, it is hereby

ORDERED that the appeal is hereby DISMISSED on the authority of *Feres v. United States,* 340 U.S. 135 (1950), and its progeny, and that each party shall bear its own costs.

By the Court:

/s/ EDWARD R. BECKER
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 88-2831

JOSEPH T. WOLPERT, III AND KATHLEEN M. WOLPERT, INDIVIDUALLY AND AS GUARDIANS OF JOSEPH T. WOLPERT, IV, COURTNEY L. WOLPERT, SHAWNA L. WOLPERT, ERIN M. WOLPERT, AND ASHLEY K. WOLPERT, PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

ORDER

AND NOW, this 21st day of July 1988, upon consideration of defendant's motion to dismiss and plaintiffs' response thereto it is hereby

ORDERED

that plaintiffs' complaint is dismissed.

/s/ JOSEPH L. MCGLYNN, JR.
District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 88-2831

JOSEPH T. WOLPERT, III AND KATHLEEN M. WOLPERT, INDIVIDUALLY AND AS GUARDIANS OF JOSEPH T. WOLPERT, IV, COURTNEY L. WOLPERT, SHAWNA L. WOLPERT, ERIN M. WOLPERT, AND ASHLEY K. WOLPERT, PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT.

COMPLAINT

1. The plaintiffs are citizens of the United States and the Commonwealth of Pennsylvania. The plaintiffs Joseph T. Wolpert, III and Kathleen M. Wolpert are husband and wife, over 18 years old, and the parents of the remaining five plaintiffs, who are minors.

2. Jurisdiction is based on the Federal Tort Claims Act, 28 U.S.C. §§1346(b) 2671-80. Venue is proper because the plaintiffs reside in this district, under 28 U.S.C. §1402(b).

3. On August 17, 1986, Mr. Wolpert and PFC Richard Marchese were members of the Delaware Army National Guard engaged in their annual two-week duty at Fort A. P. Hill, Virginia, under 32 U.S.C. §502. Mr. Wolpert's rank at that time was Specialist 4 (SP4).

4. At about 2:00 P.M. on that date, Private Marchese was in the cargo section of an Army truck unloading supplies, and Mr. Wolpert was standing behind the truck distributing the supplies.

5. In the course of the unloading and distributing of the supplies, a section of tent beam, known as a G. P. medium cross member beam, slid out of the truck onto Mr. Wolpert's right foot, causing injuries described below.

6. Private Marchese was negligent in a manner that proximately caused the incident described in paragraph 5 above, in that he was unloading the supplies in a careless and hurried manner, and threw or slid the tent beam toward Mr. Wolpert without warning him.

7. At the time of the incident described in paragraph 5 above, Private Marchese was an agent and employee of the defendant, acting within the course and scope of his employment.

8. If the defendant were a private person, it would be liable to the plaintiffs under Virginia law.

9. As proximate results of Private Marchese's negligence:

(a) Mr. Wolpert has sustained serious injuries that may be permanent and progressive, including but not limited to reflex sympathetic dystrophy of his right leg, physical and mental pain and suffering, loss of earnings, and impairment of earning capacity; and

(b) The plaintiffs have lost each other's society, companionship, and consortium.

10. Neither the incident described in paragraph 5 above nor the plaintiffs' damages were caused by any negligence of Mr. Wolpert.

11. On September 27, 1987, the plaintiffs filed a claim with the General Claims Division of the U.S. Army Claims Service, Department of the Army, an agency of the defendant. That agency denied the claim on October 7, 1987, and this suit was duly commenced within six months of the denial.

WHEREFORE the plaintiffs respectfully request that this court enter judgment in their favor and against the defendant in amounts sufficient to compensate them for their damages, plus pre- and post-judgment interest, attorney's fees, and the costs of this action.

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